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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 KATHLEEN D. GATES,

11 Plaintiff,

12 vs.

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15 MCT GROUP, INC., et al,

16 Defendants.

CASE NO. 13cv2611-MMA (DHB)

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT;**

[Doc. No. 21]

**DENYING PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

[Doc. No. 35]

17
18 Plaintiff Kathleen D. Gates brings this fair debt collection action against
19 Defendants MCT Group, Inc. and the Law Offices of Peter W. Singer. The parties
20 have filed motions for summary judgment. *See* Doc. Nos. 21, 35. For the reasons
21 set forth below, the Court **GRANTS IN PART** and **DENIES IN PART**
22 Defendants' motion and **DENIES** Plaintiff's motion.

23 **BACKGROUND**

24 The following facts are not reasonably in dispute.¹ Plaintiff Kathleen Gates
25 incurred a debt to San Diego County Credit Union based on the use of a personal
26 credit card. Plaintiff fell behind on the debt payments. The credit union assigned

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28 ¹ These facts are taken from the parties' statements of undisputed facts and responses thereto, together with pertinent cited exhibits and relevant deposition testimony.

1 the debt to Defendant MCT Group, Inc. (“MCT”) for collection. MCT retained
 2 Defendant Law Offices of Peter W. Singer (“Singer”) to file suit in state court
 3 against Plaintiff on MCT’s behalf. Ultimately, the state court entered a default
 4 judgment against Plaintiff in favor of MCT and a writ of execution was issued.

5 Plaintiff receives benefits from the Social Security Administration via direct
 6 deposit into a checking account with Wells Fargo Bank. Plaintiff intermittently
 7 receives money from other sources, including her son and daughter-in-law, which
 8 she deposits into her checking account. Plaintiff also maintains a savings account
 9 with Wells Fargo. Plaintiff transfers a portion of the funds in her checking account
 10 to her savings account through a recurring transfer every month.

11 On July 16, 2013, Defendants authorized the San Diego County Sheriff to
 12 serve a notice of bank levy on Wells Fargo, with the following instructions: “Please
 13 levy on all sums on deposit for the judgment debtor(s). Do not restrict to accounts
 14 indentified [sic] below. Please hold writ for full 6 months term.” *See* Plaintiff’s
 15 Exhibits in Support of Motion for Partial Summary Judgment, Ex. C. On July 24,
 16 2013, the Sheriff served Wells Fargo with the notice of bank levy. *See id.*, Ex. J.
 17 On that same date, Wells Fargo deducted \$201.67 from Plaintiff’s savings account,
 18 consisting of a \$125 legal order processing fee charged by Wells Fargo and \$76.67
 19 withdrawn as levied funds.² *See* Defendants’ Exhibits In Support of Motion for
 20 Summary Judgment, Ex. D. Wells Fargo did not deduct any funds from Plaintiff’s
 21 checking account.

22 On or about August 1, 2013, Plaintiff returned a Claim of Exemption to the
 23 levying officer, seeking exemption of the full amount of the levied funds as Social

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 25 ² Plaintiff repeatedly represents to the Court throughout her pleadings that the
 26 amount levied from her account was \$201.76. *See, e.g.*, Doc. No. 35-1 at 4; Doc. No.
 27 38 at 10; Doc. No. 47 at 19, 14; Doc. No. 49 at 2. This is an inaccurate representation.
 28 It is undisputed that the levying officer only received \$76.76 in levied funds from the
 account. *See, e.g.*, Plaintiff’s Exhibits In Support of Motion for Partial Summary
 Judgment, Ex. J. The remainder of the \$201.76 – the \$125 legal order processing fee
 – was charged, withdrawn, and retained by Wells Fargo. Pursuant to state law, Wells
 Fargo was authorized to withdraw its “standard fee or charge for processing the levy.”
See Cal. Code. Civ. Pro. § 700.140.

1 Security benefits pursuant to 42 U.S.C. § 407. *See* Plaintiff's Deposition, Ex. 3.
2 Defendants did not oppose the Claim of Exemption. On September 6, 2013, the
3 levying officer returned the \$76.67 in levied funds to Plaintiff. *Id.* Neither MCT
4 nor Singer ever received any money as a result of the levy.

5 On October 29, 2013, Plaintiff commenced this action against MCT and
6 Singer. Plaintiff's amended complaint, filed on December 16, 2013, is the operative
7 pleading. *See* Doc. No. 4. The Court previously dismissed several causes of action
8 pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Doc. No. 12. Plaintiff's
9 remaining claims arise under the Fair Debt Collection Practices Act ("FDCPA"), 15
10 U.S.C. §§ 1692, *et seq.*, specifically: (1) Section 1692e(5) (MCT and Singer
11 threatened to take an action that cannot legally be taken or that is not intended to be
12 taken); (2) Section 1692f (MCT and Singer used an unfair or unconscionable means
13 of collecting a debt); (3) Section 1692e(10) (MCT made use of a false representation
14 or deceptive means to collect or attempt to collect a debt). Plaintiff also has a
15 companion state law claim under the Rosenthal Fair Debt Collection Practices Act
16 ("Rosenthal Act"), California Civil Code §§ 1788-1788.32.³ *See Riggs v. Prober &*
17 *Raphael*, 681 F.3d 1097, 1100 (9th Cir. 2012) ("The Rosenthal Act mimics or
18 incorporates by reference the FDCPA's requirements, including [§ 1692e], and
19 makes available the FDCPA's remedies for violations.") (citing Cal. Civ. Code §
20 1788.17).

21 Defendants move for summary judgment as to Plaintiff's FDCPA claims and
22 request that the Court decline to exercise supplemental jurisdiction over Plaintiff's
23 Rosenthal Act claim. Plaintiff moves for partial summary judgment as to the issue
24 of Defendants' liability on all claims.

25
26 ³ In her amended complaint, Plaintiff requests an award of treble damages
27 pursuant to California Civil Code § 3345, alleging that Defendants knew or should have
28 known that their conduct was directed toward a senior citizen. *See* Doc. No. 4.
However, Plaintiff now stipulates that she was not a "senior citizen" at the time of the
events in question and no longer asserts a claim for treble damages under California
Civil Code § 3345. *See* Plaintiff's Opposition to Defendants' Motion for Summary
Judgment, 21.

LEGAL STANDARD

“A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of establishing the basis of its motion and of identifying the portions of the declarations, pleadings, and discovery that demonstrate absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it could affect the outcome of the suit under applicable law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248. The party opposing summary judgment cannot “‘rest upon the mere allegations or denials of [its] pleading’ but must instead produce evidence that ‘sets forth specific facts showing that there is a genuine issue for trial.’” *Estate of Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir.) (quoting Fed. R. Civ. P. 56(e)), cert. denied, 555 U.S. 827 (2008).

RELEVANT LAW

I. FDCPA

“Seeking somewhat to level the playing field between debtors and debt collectors, the FDCPA prohibits debt collectors ‘from making false or misleading representations and from engaging in various abusive and unfair practices.’” *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010) (quoting *Heintz v. Jenkins*, 514 U.S. 291, 292 (1995)). “The FDCPA imposes strict liability on creditors, including liability for violations that are not knowing or intentional.” *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 952 (9th Cir. 2011) (quotation omitted). As relevant here, Sections 1692e and 1692f generally

1 prohibit debt collectors from engaging in false, deceptive, misleading, unfair, or
 2 unconscionable conduct. 15 U.S.C. §§ 1692e, 1692f. “Whether conduct violates
 3 Sections 1692e or 1692f requires an objective analysis that takes into account
 4 whether ‘the least sophisticated debtor would likely be misled by a
 5 communication.’” *Donohue*, 592 F.3d at 1030 (citing *Guerrero v. RJM Acquisitions*
 6 *LLC*, 499 F.3d 926, 934 (9th Cir. 2007)).

7 Section 1692f provides in pertinent part, “[a] debt collector may not use unfair
 8 or unconscionable means to collect or attempt to collect any debt.” 15 U.S.C. §
 9 1692f. Section 1692e provides that a “[a] debt collector may not use any false,
 10 deceptive, or misleading representation or means in connection with the collection of
 11 any debt.” 15 U.S.C. § 1692e. The statute goes on to specify certain types of
 12 conduct that qualify as violations. *Id.* Section 1692e(5) prohibits “[t]he threat to
 13 take any action that cannot legally be taken or that is not intended to be taken.” *Id.* §
 14 1692e(5). Subsection (10) prohibits “[t]he use of any false representation or
 15 deceptive means to collect or attempt to collect any debt or to obtain information
 16 concerning a consumer.” *Id.* § 1692e(10). “In this circuit, a debt collector’s liability
 17 under § 1692e of the FDCPA is an issue of law.” *Gonzales v. Arrow Fin. Servs.,*
 18 *LLC*, 660 F.3d 1055, 1061 (9th Cir. 2011) (citation omitted).

19 **2. Protection of Social Security Benefits**

20 The crux of Plaintiff’s claims is that Defendants violated the FDCPA by
 21 causing a levy to be placed upon her bank accounts without regard to whether the
 22 funds contained therein were exempt. Underlying this theory of wrongdoing is the
 23 manner in which exempt funds, such as Social Security benefits, are protected under
 24 state and federal law.

25 The Anti-Attachment Provision of the Social Security Act, 42 U.S.C. §
 26 407(a), prohibits creditors and debt collectors from using legal process to reach
 27
 28

1 Social Security benefits.⁴ *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413,
 2 415-17 (1973). The Social Security Administration, which has the authority to
 3 interpret laws dealing with social security benefits and to promulgate rules and
 4 regulations thereunder, *see* 42 U.S.C. 405(a), has explained that the exemption in
 5 Section 407(a) may be used as an affirmative defense by a beneficiary after funds
 6 have been removed from an account pursuant to garnishment or levy. *See* Social
 7 Security Administration, Program Operations Manual System, GN 02410.001,
 8 available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0202410001> (“If a
 9 beneficiary is ordered to pay his/her benefits to someone else, or his/her benefits are
 10 taken by legal process, he/she can use section [407] as a personal defense against
 11 such actions.”).

12 The protection provided by Section 407(a) is incorporated into Part 212 of
 13 Title 31 of the Code of Federal Regulations, a regulatory scheme enacted in 2011 for
 14 the protection of federal benefits from levy, garnishment, and other legal process.
 15 The regulations establish procedures for financial institutions when served with a
 16 garnishment order or levy against an account holder “into whose account a
 17 [protected] Federal benefit payment has been directly deposited.” 31 C.F.R. § 212.1.
 18 The regulations require that a financial institution conduct an account review and
 19 follow certain procedures when served with a garnishment order or levy. *Id.* §
 20 212.2; § 212.3 (defining an “account review”). Pursuant to the regulations, a
 21 financial institution reviews all accounts in the name of the account holder
 22 separately. *Id.* § 212.5(f). “In performing account reviews for multiple accounts in
 23 the name of one account holder, a financial institution shall not trace the movement
 24 of funds between accounts by attempting to associate funds from a benefit payment
 25 deposited into one account with amounts subsequently transferred to another

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 27 ⁴ The provision states: “The right of any person to any future payment under this
 28 subchapter shall not be transferable or assignable, at law or in equity, and none of the
 moneys paid or payable or rights existing under this subchapter shall be subject to
 execution, levy, attachment, garnishment, or other legal process, or to the operation of
 any bankruptcy or insolvency law.” 42 U.S.C. § 407(a).

1 account.” *Id.* These federal regulations act as a complement to state laws regarding
2 garnishment and levy practices, so long as the state laws are consistent with the
3 federal regulations. *Id.* § 212.9(b).

4 California has established its own set of procedures to protect public benefits
5 from legal process. Code of Civil Procedure section 704.080 provides that an
6 account into which Social Security payments are directly deposited “is exempt to the
7 extent that it consists of payments of public benefits or social security benefits”
8 authorized by the Social Security Administration. *Miller v. Bank of America, NT &*
9 *SA*, 46 Cal. 4th 630, 640 (2009) (citing Cal. Code Civ. Pro. § 704.080(c)). “Section
10 704.080, by providing such automatic exemption for direct deposit amounts,
11 provides *additional* protection to Social Security payments that are directly
12 deposited.” *Kilker v. Stillman*, 233 Cal. App. 4th 320, 323 (2015) (italics in
13 original).

14 Consistent with federal regulations, California tasks the financial institution
15 that holds a deposit account with exempt funds with protecting the funds. The
16 financial institution must provide written notice to the levying officer that the
17 deposit account is one in which payments of social security benefits are directly
18 deposited by the government or its agent. *Lange v. CIR Law Offices*, 2010 U.S.
19 Dist. LEXIS 63419, 11-12 (S.D. Cal. June 22, 2010) (citing *In re Dalaimo*, 88 B.R.
20 268, 271 (S.D. Cal. 1988) (explaining Cal. Code Civ. Pro. § 704.080 requires
21 financial institutions to notify levying officer that account has exempt social
22 security funds and put money into blocked account pending further proceedings)).

23 In the event exempt funds are erroneously seized, California law has
24 established specific procedures for the return of those funds. California Code of
25 Civil Procedure section 703.520(a) provides that “[t]he claimant may make a claim
26 of exemption by filing with the levying officer a claim of exemption together with a
27 copy thereof.” The exemption claimant has the burden of proving entitlement to the
28 exemption, and of tracing any exempt funds that have been transferred out of a

1 protected deposit account. Cal. Code Civ. Pro. § 703.580(b); § 703.080(b).

2 DISCUSSION

3 *1. Sections 1692e(5) and 1692f Claims Against MCT and Singer*

4 Defendants argue that their actions to collect on a valid state court judgment
5 via a lawful means did not violate the FDCPA. Plaintiff does not challenge the
6 validity of the state court judgment against her or the general lawfulness of a levy in
7 aid of execution. Plaintiff also does not dispute that procedural protections exist and
8 were available to her, nor can she, as she availed herself successfully of California's
9 procedure for claiming an exemption and securing the return of the levied funds.
10 Instead, Plaintiff argues that Defendants knew her bank account contained only
11 exempt Social Security benefits, therefore Defendants' effort to collect on the
12 judgment via a bank levy was prohibited as "an action that cannot legally be taken"
13 under Section 1692e(5) and was unfair or unconscionable under Section 1692f.

14 As noted above, "liability under Section 1692e is an issue of law." *Gonzales*,
15 660 F.3d at 1061 n.3. Thus, the Court must determine whether Defendants' act of
16 authorizing the San Diego County Sheriff to serve a Notice of Levy on Wells Fargo,
17 with instructions to levy "all sums on deposit" in Plaintiff's accounts, constitutes a
18 "threat to take any action that cannot legally be taken" such that the action was likely
19 "to deceive or mislead a hypothetical least sophisticated debtor." *Wade v. Regional*
20 *Credit Ass'n*, 87 F.3d 1098, 1100 (9th Cir. 1996) (quotation omitted).

21 As an initial matter, Plaintiff admitted during deposition that Defendants
22 never threatened to seize her Social Security benefits. *See* Plaintiff's Depo., 67:1-6.
23 Moreover, Defendants' authorization of the bank levy was not a "threat," but an
24 action – one which Defendants had a legal right to pursue even if it ultimately was
25 unsuccessful. *See Heintz*, 514 U.S. at 296 (holding that the action of filing a lawsuit,
26 even if it "turns out ultimately to be unsuccessful," is not "by itself" a threat of an
27 "action that cannot legally be taken.")). However, even if a hypothetical "least
28 sophisticated debtor" would have viewed the bank levy as a "threat," he or she

1 would not have considered the levy an “action that cannot be legally taken” because
2 notice of the legal basis for the action was provided.

3 Plaintiff received a Notice of Levy signed by the Sheriff’s authorized agent,
4 informing her that the “property to be levied upon” included:

5 Any and all deposit accounts, safe deposit boxes, monies, credits, rents,
6 debts, effects due or owing the judgment debtor in the possession or under
7 the control of the person, business, firm, association, partnership,
8 corporation or financial institution listed under garnishee. This levy is
made in accordance with SEC.700.140 or 700.150 CCP. (Wells Fargo
Bank 930 7/24)

9 See Plaintiff’s Depo., Ex. 3. Plaintiff also received a copy of the writ of execution, a
10 list of assets exempt from levy on a judgment, and a list of current dollar amounts of
11 those exemptions.⁵ *Id.* Included with the list of exempt assets was the following
12 instruction:

13 If you believe the assets that are being levied on are exempt, file a claim
14 of exemption form, which you can get from the levying officer.

15 *Id.* The Notice of Levy and attached documents originated from the Sheriff’s Office,
16 were served by the Sheriff’s authorized agent, cited relevant California statutes, and
17 provided the necessary pertinent information regarding California’s levy procedure,
18 how to determine if any property is exempt, and what to do in the event of an
19 exemption. Thus, a hypothetical “least sophisticated debtor” would not have been
20 confused, misled, or deceived into thinking that Defendants were threatening to take
21 an “action that cannot be legally taken.”

22 _____
23 ⁵ Despite an apparent contradiction in the record, the Court finds – and the parties
24 do not appear to dispute – that Plaintiff personally received the Notice of Levy and lists
25 of exemptions and exemption amounts. When asked by defense counsel during
26 deposition, Plaintiff could not recall receiving any documents from the Sheriff’s Office.
27 See Plaintiff’s Depo. at 80:4-5. However, later during the deposition Plaintiff’s counsel
28 tendered three documents to defense counsel, including **“everything that Ms. Gates
provided to me about the levy**, as well as the letters we sent to the Sheriff’s
Department with regard to the claim of exemption.” *Id.* at 82:17-20 (emphasis added).
The documents include the Notice of Levy signed by the Sheriff’s authorized agent and
addressed to Plaintiff, the writ of execution, the lists of exempt assets and amounts, and
the forms submitted by Plaintiff in relation to her claim of exemption. *Id.*, Ex. 3. Based
on Plaintiff’s counsel’s statement that Plaintiff provided the documents, the Court finds
that Plaintiff in fact received the Notice of Levy and attached documentation.

1 Plaintiff argues that the illegal action at issue here is not the levy itself, but
2 rather levying accounts with the knowledge that the accounts contained only exempt
3 funds. Because it is a strict liability statute, Defendants' knowledge is irrelevant to
4 whether they violated Section 1692e(5). *McCollough*, 637 F.3d at 952. Regardless,
5 Plaintiff relies on two pieces of evidence to argue that Defendants knew at the time
6 they authorized the bank levy that Plaintiff's accounts contained only exempt Social
7 Security benefits. First, Plaintiff testified that she informed MCT's representative
8 during a phone call that the only income she receives comes from Social Security.
9 See Plaintiff's Depo., 46:18-21. Second, the credit union provided client account
10 notes to MCT after assigning the debt for collection that indicated Plaintiff is on a
11 "fixed income." See Censullo Depo., 94-95.

12 Neither Plaintiff's statement to the MCT representative nor the credit union's
13 notes regarding Plaintiff's "fixed income" establish that Defendants knew there were
14 no non-exempt funds in Plaintiff's bank accounts. Furthermore, Defendants could
15 not have had knowledge of something that was simply not true. Plaintiff's banking
16 statements demonstrate without dispute that, in fact, not "all sums on deposit" in
17 Plaintiff's accounts were exempt funds. See Defendants' Exhibits in Support of
18 Motion for Summary Judgment, Exs. C and D. Plaintiff deposited non-exempt
19 funds from other sources into her checking account and those funds then became
20 available for recurring transfer to her savings account. *Id.* In the months prior to
21 service of the levy, Plaintiff deposited hundreds of dollars into her accounts from
22 sources other than the Social Security administration.⁶ See *id.*, Ex. D. Plaintiff's
23 testimony that her Social Security benefits are her only source of funds is
24 contradicted by the record and therefore the Court is not obligated to "adopt that
25 version of the facts for purposes of ruling on a motion for summary judgment."

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28 ⁶ Plaintiff also conceded at the end of her deposition that her son gives her
"money for necessities." See Plaintiff's Depo., 96:1-4.

1 *Scott v. Harris*, 550 U.S. 372, 380 (2007).

2 There is no evidence in the record to suggest that Defendants failed to follow
 3 the appropriate procedure under California law for authorizing the levy on Plaintiff's
 4 accounts at Wells Fargo. There is no evidence that Defendants authorized the levy
 5 with the knowledge that Plaintiff's bank accounts contained *only* exempt funds.
 6 There is no evidence that Defendants levied any funds from Plaintiff's protected
 7 deposit account. The \$76.76 in levied funds were withdrawn from Plaintiff's
 8 savings account, and there is no evidence that any direct deposits of Social Security
 9 payments were made electronically to Plaintiff's savings accounts by a benefit
 10 agency. Thus, Plaintiff's savings account was not protected by an automatic
 11 exemption under state or federal law.⁷ To the extent the \$76.76 consisted of Social
 12 Security benefits, the funds remained subject to protection under Section 407(a). As
 13 such, Plaintiff was entitled to claim exemption from levy, which she did. *Kilker*,
 14 233 Cal. App. 4th at 323 ("If [funds] are not directly deposited, the judgment debtor
 15 may claim exemption from levy but must prove such funds were Social Security
 16 payments."). If challenged, Plaintiff would have had the burden of proving the
 17 funds were Social Security payments. *Id.* at 324. However, Defendants did not
 18 challenge the claim of exemption and the levying officer returned the \$76.76 to
 19 Plaintiff.

20 In sum, Defendants did not threaten to take "an action which cannot legally be

22 ⁷ Only electronic deposits made by a benefit agency, such as the Social Security
 23 Administration, are automatically protected by federal financial regulations from levy
 24 or garnishment. *See* 31 C.F.R. § 212.3 and § 212.5(b) and (c). Because no payments
 25 were electronically deposited by a benefit agency into Plaintiff's savings account during
 26 the specified look back period, Wells Fargo was not required to follow the procedures
 27 for protecting the funds in Plaintiff's savings account. *See id.* § 212.5(b) (where no
 28 benefit payment is deposited during the look back period, the financial institution is not
 required to follow the procedures in § 212.6); § 212.6 (the provisions of § 212.6 apply
 only if an account review shows that "a benefit agency deposited a benefit payment into
 an account during the look back period."). Likewise, California law provides automatic
 protection for only those accounts "in which payments of public benefits or social
 security benefits are directly deposited by the government or its agent." Cal. Code Civ.
 Pro. § 704.080(a)(1).

1 taken.” Plaintiff’s protected deposit account was never levied. Plaintiff’s savings
2 account was levied, but she claimed exemption and the funds were returned. The
3 evidence shows that all parties involved complied with state and federal law and the
4 system worked as it was supposed to protect Plaintiff’s exempt assets. Therefore,
5 the Court finds as a matter of law that Defendants did not violate Section 1692e(5)
6 of the FDCPA.

7 Nor could a reasonable jury find that Defendants’ actions were unfair or
8 unconscionable under Section 1692f. Plaintiff makes much of the fact that
9 Defendants did not investigate the source of the funds in her bank accounts prior to
10 authorizing the levy. Plaintiff asserts that “[a]t no time have any of the defendants
11 requested from me the source of the funds in my bank accounts.” See Plaintiff’s
12 Decl’n in Support of Opposition to Defendants’ Motion for Summary Judgment at ¶
13 9. She argues that this failure to investigate is in part what renders Defendants’
14 actions in this case unfair or unconscionable.

15 Plaintiff cites several district court cases from other circuits to support her
16 argument, including *Bray v. Cadle Co.*, 2010 U.S. Dist. LEXIS 109470 (S.D. Tex.
17 Oct. 12, 2010), and *Hogue v. Palisades Collection, LLC*, 494 F. Supp. 2d 1043 (S.D.
18 Iowa 2007). However, both cases are factually distinguishable, originate from
19 jurisdictions with contrasting state law garnishment procedures, and rely on
20 questionable legal analysis. The bottom line here is that, right or wrong, a judgment
21 creditor has no duty under either California or federal law to investigate, much less
22 confirm, that a judgment debtor’s bank accounts contain only non-exempt funds
23 prior to authorizing a levy on those accounts. It is unreasonable to conclude that a
24 judgment creditor’s failure to conduct a pre-levy debtor’s exam, when there is no
25 legal obligation or requirement to do so, constitutes unfair or unconscionable action.
26 On this record, no reasonable jury could conclude that Defendants’ conduct in
27 authorizing a levy to be placed on Plaintiff’s accounts constituted an unfair or
28 unconscionable means of collecting a debt.

1 Accordingly, the Court will grant summary judgment in favor of Defendants
2 as to Plaintiff's Sections 1692e(5) and 1692f claims.

3 **2. Section 1692e(10) Claim Against MCT**

4 Plaintiff asserts that an MCT representative stated during a telephone call that
5 Plaintiff's Social Security income was not exempt from the levy on her bank
6 accounts because she had transferred the funds from her checking account into her
7 savings account. Plaintiff argues that this is a false statement and constitutes a
8 violation of section 1692e(10). Defendants dispute whether an MCT representative
9 actually made any such statement, but argue that MCT is nevertheless entitled to
10 summary judgment because the statement is not false or misleading.

11 Section 1692e(10) has been referred to as a "catchall" provision. *Gonzales*,
12 660 F.3d at 1062. As noted above, it prohibits "[t]he use of any false representation
13 or deceptive means to collect or attempt to collect any debt or to obtain information
14 concerning a consumer." 15 U.S.C. § 1692e(10). The false or misleading
15 representation must be "material" in order for its utterance to violate the FDCPA.
16 *Donohue*, 592 F.3d at 1033. The Ninth Circuit has explained that "[i]n assessing
17 FDCPA liability, we are not concerned with mere technical falsehoods that mislead
18 no one, but instead with genuinely misleading statements that may frustrate a
19 consumer's ability to intelligently choose his or her response." *Id.* at 1034. "The
20 purpose of the FDCPA, 'to provide information that helps consumers to choose
21 intelligently,' would not be furthered by creating liability as to immaterial
22 information because 'by definition immaterial information neither contributes to that
23 objective (if the statement is correct) nor undermines it (if the statement is
24 incorrect).'" *Id.* at 1033 (quoting *Hahn v. Triumph P'ships LLC*, 557 F.3d 755,
25 757-58 (7th Cir. 2009)).

26 The subject phone call between Plaintiff and the MCT representative took
27 place on July 26, 2013, two days after Wells Fargo was served with the Notice of
28 Levy and withdrew funds from Plaintiff's savings account. *See* Kline Depo., Ex. 2.

1 What exactly was said during the call, and by whom, is disputed. When queried
2 during deposition, Plaintiff described the phone call as follows:

3 Q: And so you called the MCT Group, and what did you tell them?

4 A: I said I guess it was Mr. Clark [MCT representative's pseudonym]
5 that I spoke to? Mr. Clark, is that his name? I said, You've made a
6 mistake. And he says, Why? And I said, Well, you've taken money
7 that is protected by the federal government. And he said, I haven't
8 made any mistake. He said, It's not protected by the federal
9 government. And he said the same thing the bank said, the same
10 thing that the bank said, that once the money is transferred from
11 savings to checking it's no – the source is no longer – there's a
12 question on the source. It's no longer considered Social Security.

13 (. . .)

14 He said, We're not guilty we didn't do anything wrong. He knew
15 about what happened and the amount and everything, and they
16 didn't do anything wrong. He didn't do anything wrong, he said. I
17 didn't have to tell him anything.

18 See Plaintiff's Depo., 32:13-25; 34:4-8. Plaintiff further testified that the MCT
19 representative "said that when the money is transferred [from checking to savings] it
20 loses it's [sic] original – it no longer is Social Security, it's just money." See *id.*,
21 94:17-19. MCT's representative remembers the conversation differently:

22 Q: Okay. And this call came after both had been taken, against her
23 home and her bank account?

24 A: Yes.

25 (. . .)

26 Mrs. Gates was in complete control of the conversation, she was
27 very hyperactive and it was really not a conversation, but her just
28 kind of – almost a stream of consciousness of different things that
she was saying and I listened.

Q: Okay. And did she hang up or did you guys have a chance to speak
after she had a stream of consciousness, as you put it?

A: As I recall, we just concluded the conversation and I said okay and
that was the end of it.

Q: Was there any discussion about which funds are exempt and which
funds are not exempt?

A: I didn't have any discussion with her about her funds.

1 See Kline Depo., 43:2-4; 43:16-44:5. The July 26, 2013 phone call was not recorded
2 by either Plaintiff or MCT.

3 Based on the disputed recollections of the conversation, the Court cannot
4 determine what, if anything, the MCT representative said to Plaintiff during the call,
5 much less whether any representations were false, misleading, or material. Despite
6 this, Defendants urge the Court to find as a matter of law that MCT did not violate
7 Section 1692e(10). Defendants essentially argue that even if Plaintiff's recollection
8 of the conversation is accurate, her claim fails because the statements she attributes
9 to the MCT representative were not false. However, that is not the case. If the MCT
10 representative told Plaintiff that after she transferred Social Security benefits from
11 her checking account into her savings account that "it is no longer Social Security,"
12 as Plaintiff claims, such a representation is not necessarily true and could mislead a
13 hypothetical "least sophisticated debtor."

14 Pursuant to California law, "a fund that is exempt remains exempt to the
15 extent that it can be traced into deposit accounts or in the form of cash or its
16 equivalent." Cal. Code Civ. Pro. § 703.080(a). By stating or insinuating otherwise,
17 a debt collector could confuse or mislead a "least sophisticated debtor" into
18 believing that Social Security benefits are no longer exempt from legal process
19 under state and federal law once levied from an account that is not automatically
20 protected. This could cause the debtor to not claim an exemption, which in turn
21 would result in the false or misleading representation assisting in the collection of
22 the debt. That such a scenario did not occur here is of no moment, since the Court
23 must consider things from the perspective of the hypothetical "least sophisticated
24 debtor."

25 Having reviewed the conflicting evidence presented by the parties, the Court
26 cannot conclude as a matter of law that MCT did not violate Section 1692e(10) of
27 the FDCPA. It will be for the trier of fact to do so. Accordingly, the Court must
28 deny both parties' motions for summary judgment as to this claim.

1 **3. *Rosenthal Act Claim***

2 The Rosenthal Act requires compliance with the FDCPA, and a debt collector
 3 that violates the FDCPA also violates the Rosenthal Act. *See* Cal. Civ. Code §
 4 1788.17; *Hosseinzadeh v. M.R.S. Assocs.*, 387 F. Supp. 2d 1107, 1118 (C.D. Cal.
 5 2005). Because there exists triable factual issues as to Plaintiff's Section 1692e(10)
 6 claim, the Court also finds that a triable issue exists regarding MCT's liability under
 7 Section 1788.17 of the Rosenthal Act. Accordingly, the Court will deny both
 8 parties' motions for summary judgment as to Plaintiff's Rosenthal Act claim against
 9 MCT.

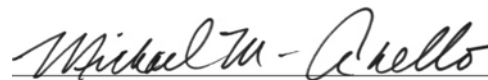
10 **CONCLUSION**

11 Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN**
 12 **PART** Defendants' motion for summary judgment and **DENIES** Plaintiff's motion
 13 for partial summary judgment. The Court dismisses Plaintiff's FDCPA Sections
 14 1692e(5) and 1692f claims against Defendants with prejudice. The Court dismisses
 15 Plaintiff's Rosenthal Act claim against Defendant Singer with prejudice. The Clerk
 16 of Court is instructed to terminate this action as to Defendant Singer.

17 Plaintiff's FDCPA Section 1692e(10) and Rosenthal Act claims against
 18 Defendant MCT will proceed to trial.

19 **IT IS SO ORDERED.**

20 DATED: March 13, 2015

21 

22 Hon. Michael M. Anello
 23 United States District Judge